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No. 03-9685

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when a federal prisoner whose sentence was enhanced on the basis of a state-court conviction files a motion to vacate the sentence on the ground that the state-court conviction has since been vacated, the vacatur of the state-court conviction is the "fact[] supporting the claim" that triggers the running of the one-year limitation period under 28 U.S.C. 2255 ¶ 6(4).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-31a) is reported at 340 F.3d 1219. The order of the district court (Pet. App. 33a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2003. A petition for rehearing was denied on December 22, 2003 (Pet. App. 1a-6a). The petition for a writ of certiorari was filed on March 22, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Middle District of Georgia, petitioner was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to 188 months of imprisonment. The court of appeals affirmed, and this Court denied certiorari. Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied the motion, and the court of appeals affirmed.

1. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there was no statutory time limit on the filing of a motion to vacate a federal prisoner's sentence under 28 U.S.C. 2255. The AEDPA established such a limitation period. Paragraph 6 of Section 2255 now provides that "[a] 1-year period of limitation shall apply to a motion under this section." Paragraph 6 also provides that the limitation period runs "from the latest of" four events, including "the date on which the judgment of conviction becomes final," 28 U.S.C. 2255 ¶ 6(1), and "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence," id. ¶ 6(4). The AEDPA took effect on April 24, 1996, but in cases in which the judgment of conviction became "final" before that date, the courts of appeals have uniformly afforded prisoners a one-year grace period, running

from the AEDPA's effective date, within which to file their Section 2255 motions. See Pet. App. 12a n.2.

2. On six occasions in 1993 and 1994, petitioner sold cocaine base to undercover law-enforcement officers in Lenox, Georgia. Petitioner made some of the sales while he was on weekend furloughs from the Cook County, Georgia, Jail, where he was serving a sentence for a prior state drug offense. PSR ¶¶ 9-15, 60-61.

3. A grand jury in the Middle District of Georgia returned an indictment charging petitioner with one count of conspiracy to possess cocaine base with the intent to distribute it, in violation of 21 U.S.C. 846, and five counts of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Pursuant to a plea agreement, petitioner pleaded guilty to a single count of distribution. Gov't C.A. Br. 2; PSR ¶¶ 1, 5-6.

The Presentence Investigation Report (PSR) determined that petitioner had at least eight prior convictions, which resulted in a total of 20 criminal history points and placed him in criminal history category VI. PSR ¶¶ 39-64. The PSR also determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1, based on two 1989 convictions in Cook County, Georgia, Superior Court for distribution of cocaine. PSR ¶¶ 32-33, 65. Petitioner's offense level under the career-offender provision was 32, see Sentencing Guidelines § 4B1.1(b)(C), and, with a three-level reduction for acceptance of responsibility, the applicable

Guidelines range was 151 to 188 months of imprisonment. PSR ¶¶ 32-36, 79. If petitioner had not been classified as a career-offender, his offense level would have been 25, and his Guidelines range would have been 110 to 137 months of imprisonment. PSR ¶ 79.

Petitioner filed written objections to the PSR, including an objection to his classification as a career offender, but he did not explain the basis for that objection. At the sentencing hearing, petitioner's counsel advised the district court that the objections to the PSR were being withdrawn, and petitioner confirmed that he did not wish to pursue his objections. The district court sentenced petitioner as a career offender, and imposed a prison term of 188 months. Pet. App. 8a; Gov't C.A. Br. 4; PSR Addendum 1.

4. Petitioner appealed his sentence, arguing that he should not have been sentenced as a career offender, because his prior state-court convictions were based on guilty pleas entered without a valid waiver of his right to counsel. Pet. App. 8a, 47a. The court of appeals affirmed. Id. at 46a-47a. Because petitioner had waived his objection to the career-offender classification at the sentencing hearing, the court of appeals declined to consider whether his prior convictions were valid. Id. at 47a. In a footnote, the court "note[d] in passing" that, if the state-court convictions were vacated at some future date based on a determination that they had been obtained in violation of

petitioner's constitutional rights, "he could petition the district court under 28 U.S.C. § 2255 for the relief he now asks us to provide." Pet. App. 47a n.1. On April 22, 1996, this Court denied petitioner's petition for a writ of certiorari. Johnson v. United States, 517 U.S. 1162.

5. On April 25, 1997, a year and a day after the AEDPA's effective date, petitioner filed a motion to extend the time for filing a motion under 28 U.S.C. 2255. The district court ruled that petitioner's motion was untimely under paragraph 6(1) of Section 2255. The court denied the motion without prejudice, however, noting that circumstances might later arise that would allow petitioner to file a timely motion under a different subsection of paragraph 6. Pet. App. 9a.

6. On February 6, 1998, petitioner filed a petition for a writ of habeas corpus in Wayne County, Georgia, Superior Court, challenging seven of his prior state convictions on the ground that he had not validly waived his right to counsel at the guilty-plea hearings in those cases. Pet. App. 9a, 44a-45a. On October 24, 2000, the state court granted the petition and vacated petitioner's convictions. Ibid. Noting that the State had responded to the petition by denying the allegations but had not "filed any further transcripts of the hearings," the Superior Court found that "the record in these cases does not show an affirmative waiver of [petitioner's] right to an attorney." Id. at 45a.

7. On February 13, 2001, petitioner filed a motion under 28 U.S.C. 2255 in which he claimed that, as a consequence of the vacatur of the state convictions, he no longer qualified as a career offender. Pet. App. 9a. Petitioner contended that his motion was timely because the state court's order granting his habeas corpus petition "constitute[d] new evidence which did not exist and could not have been discovered" earlier, and the one-year time limit therefore began to run on the date of the state court's decision. Mem. in Support of Mot. to Vacate, Set Aside or Correct Sentence 3.

A magistrate judge recommended that petitioner's Section 2255 motion be denied as untimely. Pet. App. 37a-43a. The district court adopted the magistrate judge's report and recommendation and denied the motion, holding that the AEDPA's one-year limitations period expired on April 24, 1997. Id. at 33a-35a. The court noted that petitioner had waited 21 months from the denial of his certiorari petition to file his state-court habeas corpus petition, and that "a period of almost five * * * years [had] passed before he eventually filed his Section 2255 motion." Id. at 35a. The court of appeals issued a certificate of appealability on the question whether petitioner's Section 2255 motion was timely. Id. at 8a.

8. A divided panel of the court of appeals affirmed. Pet. App. 7a-31a.

a. The majority rejected petitioner's claim that the statute of limitations did not begin to run until October 24, 2000, when the state court vacated his prior convictions. Agreeing with the First Circuit's decision in Brackett v. United States, 270 F.3d 60 (2001), cert. denied, 535 U.S. 1003 (2002), and disagreeing with the Fourth Circuit's decision in United States v. Gadsen, 332 F.3d 224 (2003), see Pet. App. 15a-18a, the majority held that "a state court's vacatur of a federal prisoner's prior state convictions is not a 'fact supporting the claim or claims' under § 2255 ¶ 6(4) from which AEDPA's statute of limitation will run," Pet. App. 18a. The majority distinguished "legal propositions and results from the 'facts' referred to in § 2255," reasoning that a "factual proposition is typically something capable in principle of falsification * * * by some empirical inquiry, while a legal proposition is identified by consulting some authoritative legal source." Id. at 12a.

The majority also held that petitioner was not entitled to relief under the doctrine of equitable tolling, because he could not show that his delay in filing the Section 2255 motion "was the result of extraordinary circumstances that were beyond his control even with the exercise of due diligence." Pet. App. 19a. The court noted that petitioner "was plainly aware of whatever facts supported his collateral attack on his prior state convictions at the time his federal sentence became final in 1996," but "did not

commence his challenge to the state convictions until February 1998, nearly two years later." Ibid. The court contrasted petitioner's situation with that of the defendant in Gadsen, who did exercise "diligence in pursuing his claims." Id. at 22a.

In holding that his Section 2255 motion was time-barred, the majority rejected petitioner's reliance on "the footnoted caveat in [its] opinion affirming his sentence on direct appeal": that, if his state-court convictions were later vacated, he could file a motion under Section 2255. Pet. App. 21a. The court explained that "[n]othing in our caveat suggested that [petitioner] could take an unlimited time to commence his collateral attack on his state convictions," and noted that, while petitioner had the entire one-year grace period after the AEDPA's enactment "within which to take some action to attack his conviction and sentence," he instead "did nothing." Ibid.

b. Judge Roney dissented. Pet. App. 25a-31a. In his view, the state court's decision vacating petitioner's prior convictions was a "fact" under paragraph 6(4) of Section 2255 that was "obviously new and not previously discoverable" until the state court issued its ruling. Pet. App. 26a.

9. The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 1a-2a. Judge Barkett dissented from that order. Pet. App. 3a-4a. Reasoning that "no metaphysical barrier prevents a legal consequence from sometimes operating as a

fact," she expressed the view that "the vacatur of [a] state conviction is a fact because it is something that actually occurred and can be proven in support of [petitioner's] claim." Pet. App. 3a-4a.

ARGUMENT

Petitioner contends that, when a motion under 28 U.S.C. 2255 is based on a state-court decision vacating a prior conviction, the motion is timely under paragraph 6(4) of Section 2255 if it is filed within one year of the state court's decision, because the decision is the "fact" supporting the defendant's claim. Pet. 6-19. The court of appeals' contrary conclusion is correct; its decision does not conflict with any decision of this Court; and while the decision below does conflict with the Fourth Circuit's decision in Gadsen, there is no need for the Court to resolve that conflict at this time. Further review is therefore unwarranted.*

1. Petitioner is mistaken in his contention that "'facts' as used in * * * ¶ 6(4) is a generic term designed to capture any potential basis for a § 2255 claim." Pet. 13. As the First Circuit explained in Brackett, the "most natural reading" of the phrase "facts supporting the claim or claims" in paragraph 6(4) is that it refers to "basic, primary, or historical facts," not to court decisions or their legal consequences. 270 F.3d at 68-69.

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* The issue raised here is also raised in another case, Rivers v. United States, No. 03-9629 (filed Mar. 18, 2004), that is pending before this Court.

Accord Pet. App. 12a. It would be "an odd usage" to describe a court decision vacating a prior conviction as a "fact" that "could have been discovered" by the prisoner, Brackett, 270 F.3d at 68, because "the vacatur of prior state convictions is a court action obtained at the behest of a federal prisoner, not [something that is] 'discovered' by him," Pet. App. 13a. Other subsections of the limitation provision also support this distinction between facts and court decisions. Paragraph 6(1) of Section 2255 refers to "the date on which the judgment of conviction becomes final," and paragraph 6(3) refers to "the date on which the right asserted was initially recognized by the Supreme Court." As the court below explained, the use of the term "facts" in subsection (4) "is in contrast to those other subsection[s'] use of 'judgments' and 'rights,' two legal results distinct from historical facts." Pet. App. 13a. Accord Brackett, 270 F.3d at 68-69.

Permitting a prisoner to file a Section 2255 motion to reopen his federal sentence years after his conviction became final, as petitioner sought to do in this case, would undermine the purposes Congress sought to achieve in enacting the AEDPA and its limitation period. There is "no doubt" that Congress enacted the AEDPA "to further the principles of comity, finality, and federalism." Williams v. Taylor, 529 U.S. 420, 436 (2000). Consistent with that intent, Congress established a one-year limitation period that "quite plainly serves the well-recognized interest in the finality

of * * * judgments" by "reduc[ing] the potential for delay on the road to finality" through reasonable "restrict[ions] [on] the time that a prospective federal habeas petitioner has in which to seek federal habeas review." Duncan v. Walker, 533 U.S. 167, 179 (2001). The limitation period serves important institutional interests by "promot[ing] judicial efficiency and conservation of judicial resources, safeguard[ing] the accuracy of * * * judgments by requiring resolution of constitutional questions while the record is fresh, and lend[ing] finality to * * * judgments within a reasonable time." Acosta v. Artuz, 221 F.3d 117, 123 (2d Cir. 2000).

Contrary to petitioner's contention, the court of appeals' interpretation of paragraph 6(4) does not "ignore the effect" of state-court judgments invalidating prior state convictions. Pet. 16. Like other courts of appeals, see, e.g., United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 201 (1st Cir. 1996); United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996), the Eleventh Circuit has held that a defendant who successfully challenges a prior conviction in state court may seek relief under Section 2255 from a federal sentence that was enhanced on the basis of the prior conviction, see United States v. Walker, 198 F.3d 811, 813-814 (11th Cir. 1999). Requiring defendants to raise challenges to their state convictions promptly, however, does not subvert principles of

comity and federalism, as petitioner contends (Pet. 14-16). To the contrary, permitting defendants to delay challenges to their state-court convictions "until the state ha[s] destroyed the trial or plea records, * * * [r]ather than affording respect and finality to state proceedings," would unduly undermine the finality of state convictions. Brackett, 270 F.3d at 70.

2. Petitioner is also mistaken in his contention (Pet. 18) that the court of appeals' decision conflicts with this Court's decisions in Custis v. United States, 511 U.S. 485 (1994), and Daniels v. United States, 532 U.S. 374 (2001). In Custis, the Court held that, in the absence of express statutory authorization, a defendant may not collaterally attack prior state convictions in a federal sentencing proceeding, unless the convictions are shown to have been uncounseled in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). See 511 U.S. at 490-497. The Court noted that a defendant who successfully attacks his prior convictions in state court or through federal habeas corpus review "may then apply for reopening of any federal sentence enhanced by the state sentences," but "express[ed] no opinion on the appropriate disposition of such an application." Id. at 497. In Daniels, the Court held that a federal defendant whose sentence was enhanced based on a prior state conviction that has not been invalidated may not challenge the prior conviction in a Section 2255 proceeding (except for a preserved claim of a Gideon violation). See 532 U.S. at 382. The

Court noted that the defendant "may pursue any channels of direct or collateral review still available to challenge his prior conviction," and if successful, "may then apply for reopening of his federal sentence," but the Court again "express[ed] no opinion on the appropriate disposition of such an application." Ibid.

The court of appeals' decision is consistent with Custis and Daniels because, while those decisions require a recidivist defendant to attack his prior convictions in state court before seeking to challenge his federal sentence in a proceeding under Section 2255, neither decision addresses the time limits that would apply to such a challenge or suggests that the challenge would not be subject to the ordinary procedural rules governing collateral review. As the court of appeals correctly observed, Custis and Daniels "merely outline[] the procedure that a federal prisoner must follow to bring an indirect attack on his federal sentence"; they "do[] not speak to the time limits that apply." Pet. App. 17a.

3. While it does not conflict with any decision of this Court, the court of appeals' decision, like the First Circuit's decision in Brackett, does conflict with the Fourth Circuit's decision in Gadsen. In Gadsen, the Fourth Circuit held that the "relevant 'fact'" under paragraph 6(4) of Section 2255 "is the fact that [the prisoner's] prior state conviction has been conclusively invalidated," 332 F.3d at 227, and that a Section 2255 motion is

therefore timely if it is filed within a year of the date on which the prior state conviction is vacated. In Brackett, by contrast, the First Circuit, like the Eleventh Circuit here, held that "the operative date" under paragraph 6(4) "is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." 270 F.3d at 68. Despite the conflict, it would be premature for the Court to grant certiorari at this time.

While the First and Eleventh Circuits disagree with the Fourth Circuit's interpretation of the limitations provision of Section 2255, there is reason to believe that they agree with the Fourth Circuit's ultimate conclusion that the Section 2255 motion in Gadsen was timely under that provision. In the decision below the Eleventh Circuit explicitly stated, and in Brackett the First Circuit suggested, that a Section 2255 motion under the circumstances that were present in Gadsen would be timely on the basis of equitable tolling, which is available when a prisoner has acted diligently in pursuing his claim and the delay in filing a Section 2255 motion was a result of an extraordinary circumstance beyond his control. See Pet. App. 19a-23a; Brackett, 270 F.3d at 71. The court below stated that "on the facts of Gadsen [it] would ultimately reach the same result as [the Fourth Circuit] by allowing that [defendant] equitable tolling." Pet. App. 22a. And

while the First Circuit in Brackett could not have commented on Gadsen, which had not yet been decided, it did say that the defendant in Brackett was "no candidate for equitable tolling." 270 F.3d at 71.

The defendant in Gadsden filed a habeas corpus petition in state court less than a year after he was convicted there and more than a year before his federal conviction became final; his Section 2255 motion was delayed because it took more than three years for the state courts to resolve his challenge. 332 F.3d at 225-226, 228. Petitioner, in contrast, challenged his convictions in state court more than eight years after he was convicted there and almost two years after his federal conviction became final, Pet. App. 8a-9a, and the defendant in Brackett challenged his convictions in state court more than six years after he was convicted there and nearly four years after his federal conviction became final, 270 F.3d at 62-63. Thus, unlike the defendant in Gadsen, both petitioner and the defendant in Brackett "made no * * * attempt to act diligently," Pet. App. 20a, and instead "sat on [their] hands for a great many years," 270 F.3d at 71.

Moreover, unlike the state court in Gadsen, which vacated the conviction because the defendant "did not have a full understanding of the consequences of his plea," 332 F.3d at 225, the state courts in this case and in Brackett did not hold that the prior convictions were constitutionally invalid. The state court in this

case merely found that, because the state had failed to produce transcripts of the guilty-plea proceedings, the record did not "show an affirmative waiver of [petitioner's] right to an attorney," Pet. App. 45a, and the state court in Brackett vacated the convictions because the state prosecutor "agree[d] to vacate the * * * conviction[s] years after the records of [the] conviction[s] were destroyed," 270 F.3d at 71. For this reason, too, there is "nothing about [t]his case [or Brackett that] suggests that the equities are in [the defendant's] favor." Ibid.

Since the result in Gadsen would likely have been the same in the First and Eleventh Circuits (even if the reasoning would have been different), the conflict in the circuits will probably not result in dissimilar treatment of at least one class of prisoners: those who, like the defendant in Gadsen, challenge a state conviction in a timely manner and obtain a ruling that the conviction was unconstitutional. It appears that only one case of this type has been considered at the appellate level to date. If the Fourth Circuit extends Gadsen to every prisoner whose state-court conviction is vacated more than a year after his federal conviction becomes final, without regard to the circumstances of the case, the conflict will likely result in dissimilar treatment of another class of prisoners: those who do not challenge the state conviction until many years later or who obtain vacatur of the conviction only because the records have been destroyed or the

prosecutor has no interest in defending a conviction for which the sentence has already been served. There is some language in Gadsen, however, that suggests that the Fourth Circuit might not apply the decision to that class of prisoners. For example, the court appears to have found it significant that the delay in obtaining vacatur of the state-court conviction in that case "was due to the state court system's decisionmaking process, something obviously not under [the defendant's] control." 332 F.3d at 228. A paragraph later, moreover, the court summed up its conclusion by stating that, "in cases like Gadsen's, the federal statute of limitations begins running when the state court conviction is conclusively invalidated." Id. at 229 (emphasis added).

Thus, while there is a circuit conflict on the question presented in this case, the conflict is not sufficiently developed to warrant the exercise of the Court's certiorari jurisdiction at this time. The applicability of paragraph 6(4) of 28 U.S.C. 2255 to motions based on the vacatur of a state-court conviction has been addressed by only three courts of appeals; two of the three decisions were issued within the last 13 months; it is possible that the minority circuit will read its decision narrowly in future cases, such that the significance of the conflict will diminish; and the minority circuit has not yet had the opportunity to interpret its decision in a published opinion. For these reasons, "further consideration * * * of the problem by [the lower] courts

[may] enable [this Court] to deal with the issue more wisely at a later date." McCray v. New York, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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